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# In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 751

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

*Petitioner,*

vs.

AGNES KOSOWATZ,
Administratrix of the Estate of Joseph Frank Kosowatz, Deceased,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
**To the Court of Appeals for the Eighth Appellate District of the State of Ohio.**

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## PETITION FOR A WRIT OF CERTIORARI
## To the Court of Appeals for the Eighth Appellate District of the State of Ohio.

Now comes the New York, Chicago and St. Louis Railroad Company, petitioner, by and through its attorneys and respectfully prays that a Writ of Certiorari shall be issued to review the judgment of the Court of Appeals for the Eighth Appellate District of the State of Ohio (Cuyahoga County) entered on April 5, 1962 affirming the judgment of the Court of Common Pleas for Cuyahoga County, Ohio.

## OPINION BELOW.

The Court of Appeals for the Eighth Appellate District of the State of Ohio did not write an opinion in affirming the judgment entered upon the verdict of the jury by the Court of Common Pleas for Cuyahoga County, Ohio. The Journal Entry of the Court of Appeals is appended to this petition at page 19.

## JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3) to review the judgment of the Court of Appeals for the Eighth Appellate District of the State of Ohio affirming the judgment entered upon the verdict of the jury by the Court of Common Pleas for Cuyahoga County, Ohio, in this action which was maintained under and by virtue of Title 45 U. S. C., § 51 et seq., particularly §§ 51, 53 and 59.

The Supreme Court of the State of Ohio entered its order on July 5, 1962 overruling the petitioner's motion for an order directing the Court of Appeals for the Eighth Appellate District (Cuyahoga County, Ohio) to certify its record to the Supreme Court of the State of Ohio. Thereafter, on October 3, 1962 the Supreme Court of the State of Ohio entered its order denying the petitioner's application for rehearing in the cause pending in the Supreme Court of the State of Ohio entitled *Agnes Kosowatz, Administratrix, Plaintiff-Appellee v. New York, Chicago and St. Louis Railroad Company, Defendant-Appellant.*

On January 2, 1963 upon the petitioner's application for extension of time within which to file a petition for a writ of certiorari, this Court entered its order extending the time within which petitioner might file its petition for a writ of certiorari to and including January 17, 1963.

## QUESTIONS PRESENTED.

I. Whether the trial court committed error prejudicial to the rights of the petitioner by permitting counsel for respondent to argue to the jury the consideration of the loss of society and companionship as compensable elements of damages assessable against the petitioner in an action for wrongful death maintained under the provisions of the Federal Employers Liability Act.

II. Whether the trial court committed error prejudicial to the rights of the petitioner by overruling its motion to dismiss respondent's first cause of action for the wrongful death of her decedent under the Federal Employers' Liability Act as to the decedent's adult children who, the record discloses, had no pecuniary interest in the continued life of the decedent; and, whether the trial court committed error prejudicial to the rights of the petitioner in overruling its motion to dismiss the respondent's second cause of action for the conscious pain and suffering of her decedent under the Federal Employers' Liability Act in the absence of any evidence that the decedent's injuries were not contemporaneous with his death.

## STATUTES INVOLVED.

### Title 28 U. S. C. § 1257(3).

§ 1257. *State courts; appeal; certiorari.*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to

the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

**Title 45 U. S. C. § 51.**

§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as

being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

**Title 45 U. S. C. § 53.**

§ 53. *Contributory negligence; diminution of damages.*

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, § 3, 35 Stat. 66.

**Title 45 U. S. C. § 59.**

§ 59. *Survival of right of action of person injured.*

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. April 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.

## STATEMENT OF THE CASE.

This is an action filed by the administratrix of the estate of a deceased employee of the Petitioner, The New York, Chicago and St. Louis Railroad Company, (hereinafter some times referred to as "Nickel Plate") under the provisions of the Federal Employers' Liability Act (Title 45 U. S. C., § 51 *et seq.*).

The respondent Agnes Kosowatz, is the widow and administratrix of the estate of the petitioner's former employee. The cause was tried upon the respondent's second amended petition and the petitioner's answer thereto. In the respondent's second amended petition she sets forth two causes of action against the petitioner. In the first cause of action respondent claimed damages under the Federal Employers' Liability Act as the surviving and dependent widow of her decedent, and it was alleged that this cause of action was maintained for the dependent widow and the four adult children as the only next of kin of the decedent. Damages were claimed in the second cause of action for the conscious pain and suffering of the decedent.

The case was called for trial on April 11, 1961, before Judge William Ammer, sitting by assignment, and a jury of 12. On April 21, 1961, the jury returned a verdict for the plaintiff in the amount of $25,000.00 upon the plaintiff's first cause of action and $1,450.00 upon her second cause of action. Judgment was entered upon the verdict.

The trial court overruled the petitioner's Motion For New Trial and Motion *Non Obstante Veredicto* on May 17, 1961, and the petitioner thereafter perfected its appeal to the Court of Appeals for the Eighth Appellate District of the State of Ohio (Cuyahoga County) on questions of law.

The Court of Appeals, following briefs and oral arguments, but without writing an opinion, affirmed the judgment of the trial court through its journal entry dated April 5, 1962 (appended hereto at page 19).

On April 24, 1962 Petitioner filed its Notice of Appeal to the Supreme Court of Ohio, and on May 4, 1962 Petitioner filed its Motion For an Order Directing The Court of Appeals To Certify Its Record to the Supreme Court of Ohio. Following the filing of formal briefs and oral arguments the Supreme Court of Ohio overruled Petitioner's Motion For an Order Directing The Court of Appeals To Certify Its Record on July 5, 1962. The petitioner's Application for Rehearing of its Motion To Certify was denied by the Supreme Court of Ohio on October 3, 1962.

The evidence at the trial disclosed that the respondent is the widow (R. 208) and the administratrix of the Estate of Joseph F. Kosowatz (Plaintiff's Exhibit 1, R. 525), and that she maintains this action for the benefit of herself as the dependent widow of Joseph F. Kosowatz and her four adult children (R. 209).

There were no witnesses to the circumstances surrounding the death of the decedent and there is no direct evidence in the record as to how and when Joseph Kosowatz met his death.

Joseph F. Kosowatz, the deceased husband of respondent was employed by the petitioner, The New York, Chicago and St. Louis Railroad Company, as a machinist on February 17, 1958 (R. 51-52), on which date Mr. Kosowatz reported for work (R. 93) at what is known as the Nickel Plate's Campbell Road Yard in the city of Cleveland, Ohio (R. 51, 93).

Mr. Kosowatz arrived for work at about 8:00 A. M. on February 17, 1958 (R. 93) and the day was very cold

and windy (R. 56; 94; 30; Exhibit 2, R. 526). Although Mr. Kosowatz was his own supervisor (R. 53, 94, 254), part of his duties included the unloading of diesel fuel from tank cars for petitioner (R. 94, 255).

Tank car No. UTLK 76374, owned by the Union Tank Car Company, which was spotted on track No. 7 or the unloading dock, was unloaded of its fuel oil on February 17, 1958 (R. 238; Exhibit E-1, R. 548). A fair exhibit of the tank car as it stood on track No. 7 shortly after decedent's body was found is shown by Exhibit B (R. 132, 545).

Between 11:00 A. M. and 11:30 A. M. on February 17, 1958, Joseph Blasik, petitioner's yard clerk and fellow employee of the decedent saw the decedent in the vicinity of the clerk's office (R. 95). At 1:50 P. M. Joseph Blasik placed a call to the police (R. 96) to report that the body of the decedent had been found near the pump house and No. 7 track at the Campbell Road Yard by the petitioner's hostler Phillip R. Ponsford, shortly after he arrived at work at 1:30 P. M. The place where the decedent's body was found is approximately 340 feet from the clerk's office (R. 23).

When Joseph F. Kosowatz was found by Phillip R. Ponsford he was dead (R. 37) and his body was lying about two feet from the pump house (R. 36). The side of his face appeared to be crushed (R. 36) and there were blood spots on and in the pump house (R. 36, 99). The decedent's head was close to track No. 7 and his feet were in the direction of track No. 6 (R. 36). The decedent was lying on his back and his body was rigid (R. 38).

A view of the tank car sitting on Petitioner's track No. 7, the pump house and track No. 6 running immediately in front of the pump house is shown by petitioner's Exhibit D (R. 547).

## REASONS FOR GRANTING WRIT.

I. The trial court committed error prejudicial to the rights of the petitioner by permitting counsel for respondent to argue that loss of society and companionship, protector and helpmate are legitimate elements of damages for the consideration of the jury in assessing damages in an action for the death of a railroad employee under the Federal Employers Liability Act.

II. The trial court committed error prejudicial to the right of the petitioner:

A. By failing to dismiss the first cause of action as to the adult children of the decedent whom the evidence disclosed had no pecuniary interest in the continued life of the decedent; or, to instruct the jury that it could not award damages to the adult children of the decedent whom the evidence disclosed suffered no pecuniary loss as the result of the death of the decedent; and,

B. By failing to dismiss the second cause of action when the evidence failed to disclose that any injuries suffered by the decedent was not contemporaneous with his death.

### I.

During the course of respondent's counsel's opening argument in his summation to the jury, a large blockboard containing a list of non-compensable elements of damages which was not supported by any record evidence, was placed on a tripod before the jury. When the blockboard was unveiled by respondent's counsel the petitioner immediately objected to the use of the blackboard and to any arguments based upon the improper elements of damages listed thereon. These objections were disposed of by the trial court in the following manner (R. 445, 446):

Mr. Cardinal: I object to the use of the blackboard, your Honor.

The Court: What's all this?

Mr. G. J. McMonagle: Well, Judge, it's just part of my argument. I wrote it out. As far as the use of the blackboard, that's been upheld.

The Court: **Yes, the use of it, but as long as you are using it in evidence.**

Mr. G. J. McMonagle: Well, it's part of my argument, your Honor.

The Court: Well, proceed.

Mr. Cardinal: I object to it, your Honor.

Mr. G. J. McMonagle: As I said, I want to be fair to him. I could have waited until after he had his argument, but I wanted to tell you—**we have here items in evidence here.** There's expectation of life, 13 and a half years. That's the equivalent of 4,927 days that a person would normally be expected to live under these circumstances and part of the consideration that you have—

Mr. Cardinal: May I have an objection to the argument also, your Honor?

The Court: Well, the objection is overruled. You may proceed.

Mr. G. J. McMonagle: That we are talking about here not only loss of wages in connection with this thing. **We are talking about, the pecuniary value of a life is what it comes down to. We are talking about what a husband and father means, and I have recited** here—**Mr. Cardinal can read about them.** I don't want to take up too much time because I want him to have the opportunity—**what I want him to do and that's the reason I did this now is to tell you in his judgment and the judgment of the Nickel Plate Railroad how much a husband who contributes such items as we have in evidence here as a repairman, a plumber, a painter, gardener, a protector, helpmate, the society and companionship to his wife, how much is it worth, how much he can say in here the railroad says.**

**This is beyond the normal wages. He can say how much these things are worth per day, what they have been taken away from the persons in connection with this matter.**

I will have a few more things to say after Mr. Cardinal has his argument."

A photograph of the blackboard used by respondent's counsel is attached hereto at page 12 and marked Exhibit 1. The respondent's counsel did not offer the blackboard in evidence.

The jury was well aware of the fact, about which the trial court observed and to which respondent's counsel referred, that the list of items on the blackboard was used as evidence. However, even though petitioner's counsel refused to accept the invitation of respondent's counsel to place a value upon the improper elements of damages listed on the blackboard, the trial court again permitted respondent's counsel to use the blockboard as evidence in his closing argument to the jury (R. 469, 470, 471, 472):

"He goes on to say, yes, we admit—they have to prove it. Sure, that's been their attitude in connection with this. They said they are fair. Sure, they admit he died and believe me, so long as he wants to be anxious and considerate of me and my reputation and what we do for you people, **listen, Joseph Kosowatz died for the stockholders of the Nickel Plate Railroad and the Wheeling & Lake Erie Railroad that's part of it and the Norfolk & Western that's combined with it.**

Mr. Cardinal: I object, your Honor.

The Court: I think the argument has gone far afield.

Mr. Cardinal: Of course we are far afield.

Mr. McMonagle: All we ask is that the case be tried on the evidence as presented here and you follow

these exhibits. You consider the men who testified and I'm satisfied, we leave it with you, that the evidence will disclose that had they done what they should have done, this situation wouldn't have existed.

There is evidence in the rules that we read to you that the officers are supposed to supervise these operations, that they are not supposed to place things upon platforms, they are not supposed to carry things up on ladders by themselves, they are not supposed to lay things around there, when we finally get down to it.

Sure, I said to him—anybody can tell you this. What does he mean? They know. He does this all the time. Their firm represents this railroad. **He could say to you, listen, is this husband and father, is he worth, what, five dollars a day or something like that? They could get as ridiculous as that.**

And in my own feeling, the railroad says nothing, just abuse. That's all we've got here. 13 and a half years—

Mr. Cardinal: I object to this line of argument, your Honor.

The Court: Well, overruled.

Mr. G. J. McMonagle: And on a wage basis alone, we talked about maybe **this man is going to live to be 88,** not the one that they have that's going to retire three years or so after. This is just on the wages. **That would come to a total of $67,500 in earnings.** What are these things worth? **What is the protection of a father and a husband—**

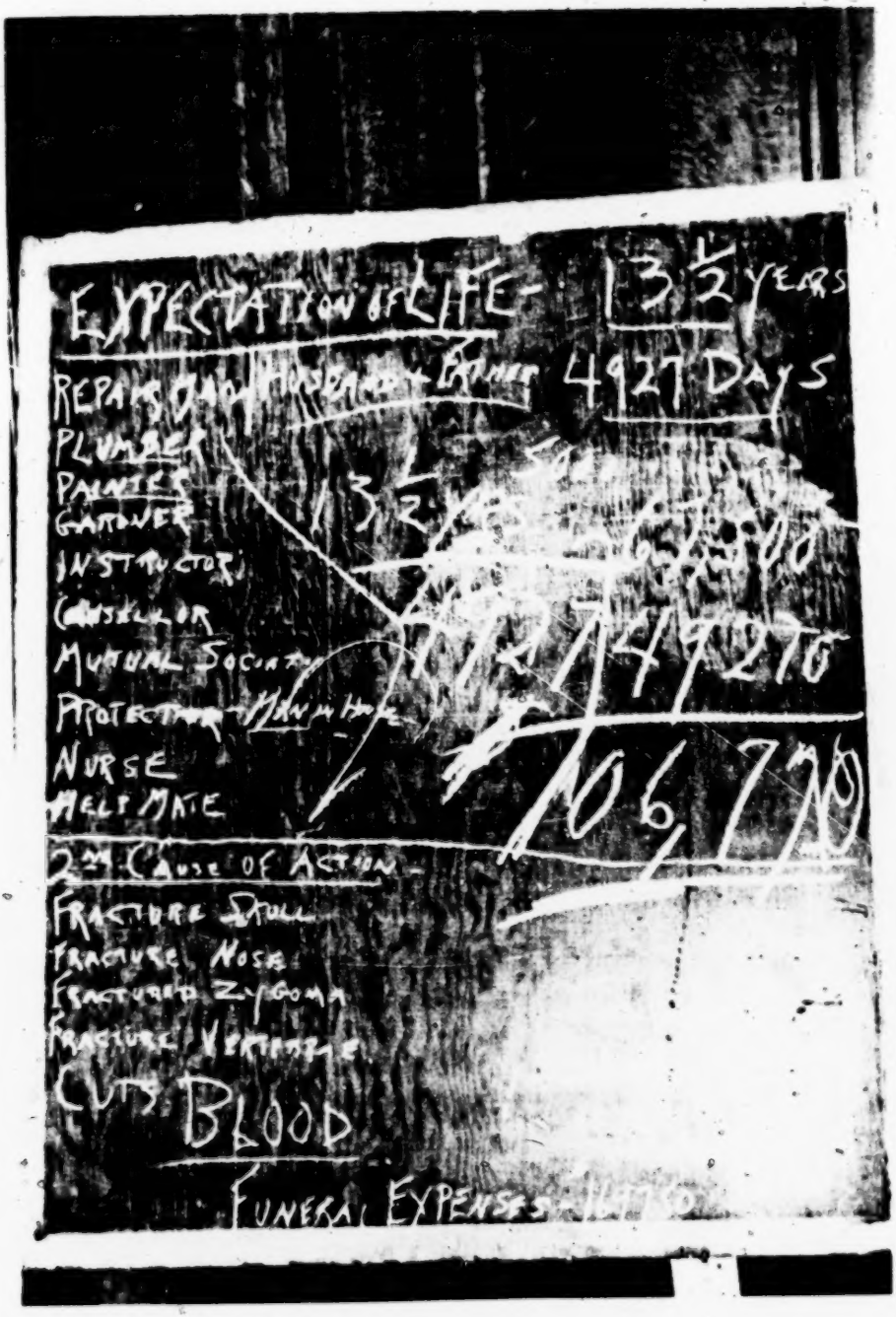
Mr. Cardinal: Do I have a continuing objection, your Honor?

Mr. G. J. McMonagle: **—a plumber—**

Mr. Cardinal: Do I have a continuing objection?

Mr. G. J. McMonagle: Your Honor, **this is all in the evidence.**

The Court: May we please approach the bench?


EXPECTATION OF LIFE- 13½ YEARS
4927 DAYS
REPAIRS
PLUMBER
PAINTER
GARDNER
INSTRUCTOR
COUNSELLOR
MUTUAL SOCIETY
PROTECTION
NURSE
HELP MATE
106,770
2ND CAUSE OF ACTION
FRACTURE SKULL
FRACTURE NOSE
FRACTURED ZYGOMA
FRACTURE VERTEBRAE
CUTS BLOOD
FUNERAL EXPENSES

(Conference at the Bench between Court and counsel out of the hearing of the jury and off the record.)

Mr. G. J. McMonagle: We say that for the 4,927 days—

Mr. Cardinal: May I have an objection, your Honor?

The Court: Well, overruled.

Mr. Cardinal: Overruled. All right, then.

Mr. G. J. McMonagle: —of pecuniary damages, the value of these things, **the value of these things as part of what is lost in connection with this thing is worth $10 a day.** Could I be any cheaper on that? Isn't that little enough for the number of years they figure? That totals $49,270, and **if you add them both up, and these are for your consideration**—you people have to decide this, not me, and **you consider them when you talk about these things**—they total up, and we are talking about a death here, these things total $106,770.

Now, you can take this figure of $10 and say it's worth $2 or $5 or nothing, if you want to, but it has a pecuniary value. It's the value, **the pecuniary value of the life of the decedent in connection with this matter,** and you can take any figures you want as to his expectation of life up to what the law has said or what the evidence shows, 13 and a half years, and when you take those things, you come up with a substantial amount of money. This is the pecuniary damage. **This is the value in money as best anybody can relate it to a living person and what his living is worth to his family and what his value is, what the pecuniary value is, and all I said $10 a day, $10 a day for the period of time that they agree and their expert agrees he'd probably live."**

The prejudice to the petitioner through the misconduct of respondent's counsel in his arguments to the jury, with the approbation of the trial court, is twofold.

First, the jury was invited to speculate upon those elements of damages listed on the blackboard and referred to in respondent's counsel's argument, i.e.: plumber, painter, gardener, protector, helpmate and society and companionship; in the absence of any record evidence of the pecuniary value of such items to either the decedent's widow or adult children. (R. 213, 208-215.)

Second, the jury was invited to speculate upon the pecuniary value of such items as the protection of a husband and father, helpmate and society and companionship which are not only not elements of damages in actions maintained under the Federal Employers' Liability Act, but are items which could not have been supported by evidence. *Michigan Central Railroad Company v. Vreeland*, 227 U. S. 59 (1913); *Rodzik v. New York Central R. Co.*, 169 F. Supp. 803 (E. D. Mich. S. D. 1959).

The propriety of permitting a jury to consider as elements of damages those items which the trial court permitted the jury in this case to consider has been repeatedly condemned by the federal courts since this court announced the principle set forth in *Michigan Central Railroad Company v. Vreeland, supra; American Railroad Company of Porto Rico v. Didricksen*, 227 U. S. 145 (1913); *First Nat. Bank in Greenwich v. National Airlines, Inc.*, 288 F. 2d 621 (2nd Cir. 1961).

II.

A.

The respondent's Second Amended Petition contained two causes of action. The first cause of action was entitled ACTION FOR RECOVERY FOR WRONGFUL DEATH DAMAGES and contained, in part, the following allegation:

> "* * * the said decedent left surviving him Agnes Kosowatz, his widow, who was dependent upon him for her support, and the following persons, his next of kin: Marian Bohacek, daughter, John Kosowatz, son, Mildred Jordan, daughter and Catherine Lepi, daughter, and that the said persons are his only next of kin and heirs at law and for whose benefit this action is brought."

During the course of the trial the decedent's widow and son took the witness stand and together they provided the only evidence in the record of the pecuniary interest that the widow and children had in the continued life of the decedent. This evidence disclosed that the decedent's four children were all adults, maintained their own families, and none received any pecuniary benefit from the decedent during his lifetime. (R. 209, 219, 220.) Only the widow received any pecuniary benefit from the decedent. (R. 219.)

At the close of all of the evidence, the petitioner moved the trial court to withdraw from the jury any consideration of damages for the decedent's four adult children and to dismiss the first cause of action as to the children. The court overruled this motion. (R. 408.)

The trial court not only refused to withdraw from the jury any consideration of damages for the decedent's four children and to dismiss the first cause of action as to them, but instructed the jury that they could award the respondent (R. 509):

"* * * such sum as under all the circumstances of this case will be just compensation for pecuniary loss suffered by the window and the next of kin because of the death of Joseph Frank Kosowatz, which loss has resulted and is reasonably certain to result from the death of said Joseph Frank Kosowatz, an employee of defendant railroad."

The evidence is absolute that the children of decedent received no pecuniary or financial benefit from the decedent after they reached their majority and prior to the decedent's death. (R. 219.)

Inasmuch as the trial court permitted respondent's counsel to exhort the jury to determine the "pecuniary value of a life" (R. 446), the worth of a "husband and father" (R. 446), the value of "the protection of a father and husband" (R. 470), and even to invite petitioner's counsel to indulge in a game of placing a *per diem* value on the life of a "husband and father" (R. 446, 470), the petitioner was certainly entitled to have the jury instructed that the pecuniary interest of the "beneficiaries." "next of kin" or "heirs at law" must be measured by his or her individual pecuniary loss. *Gulf, Colorado and Sante Fe Railway Co. v. McGinnis*, 228 U. S. 173 (1913).

Following the trial court's charge to the jury the petitioner again requested the court to instruct the jury that "* * * no amount of money for damages can be awarded to adult children who are not dependent * * *." The court refused to so instruct the jury (R. 521).

**B.**

The respondent's second cause of action sets forth in detail the various injuries that were recounted in the autopsy report of the Cuyahoga County Coroner. The respondent then alleges "* * * that the said injuries caused and resulted in Plaintiff's decedent's death; that the plaintiff's decedent suffered a severe mental and nervous shock and the most excruciating pain and mental anguish."

The evidence disclosed that Joseph Blasik last saw Joseph Kosowatz alive some time between 11:00 A. M. and 11:30 A. M. on February 17, 1958. Mr. Blasik further testified that after he was notified by Phillip Ponsford that Mr. Kosowatz's body was near the pump house he called the Cleveland Police Department at 1:50 P. M., February 17, 1958. At the time that Mr. Kosowatz was found he was lying on his back and his body was rigid (R. 38).

The coroner's report (R. 154-155; Exhibit 14 R. 535) sets forth the massive hemorrhages that occurred in the brain of the decedent as the result of an injury to his head. However, there is no evidence in the record as to the time when Joseph Kosowatz sustained the injuries which were found upon his body, nor is there any evidence how long Joseph Kosowatz lived subsequent to those injuries or that he was conscious from the time that he sustained those injuries and the time that he expired.

There is absolutely no evidence, and none was offered, that Joseph Kosowatz suffered any conscious pain or that any pain was not contemporaneous with his death.

At the close of all of the evidence the petitioner moved the trial court to withdraw the second cause of action from the consideration of jury and to dismiss the second cause of action. (R. 408.) The court overruled the motion of the petitioner and charged the jury (R. 511):

"You have a right to consider the mental anguish and suffering and pain that he underwent between the time of the injury and death, which I stated before is limited by the evidence to some three to three and a half hours."

To permit the jury to consider any damages assessable against the petitioner under the second cause of action was not warranted in view of the complete lack of evidence of the time and manner in which Joseph Kosowatz met his death. *Great Northern Railroad Co. v. Capital Trust Company*, 242 U. S. 144 (1916).

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein prayed for should be granted.

EDWIN KNACHEL,
JOHN G. CARDINAL,
*Counsel for Petitioner.*

# APPENDIX.

## JOURNAL ENTRY OF THE COURT OF APPEALS.

No. 25,678.

IN THE COURT OF APPEALS

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

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AGNES KOSOWATZ, Admrx., etc.,

*Plaintiff-Appellee,*

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

*Defendant-Appellant.*

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JOURNAL ENTRY.

April 5, 1962.

THIS CAUSE came for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript, and the original papers and pleadings from the Court of Common Pleas of Cuyahoga County, and was argued by counsel, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

IT IS, THEREFORE, considered by the Court that the judgment of the Court of Common Pleas of Cuyahoga County be, and the same is hereby affirmed, and that the appellee recover from the appellant her costs herein expended.

And the Court being of the opinion that there was reasonable grounds for this appeal, allows no penalty.

IT IS FURTHER ORDERED that a special mandate be sent to the Court of Common Pleas of Cuyahoga County, Ohio for execution upon this judgment.

To all of which appellant, by its counsel, excepts.